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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-331

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

MESCALERO APACHE TRIBE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Mescalero Apache Tribe has inherent authority over wildlife within its Reservation which preempts state regulation of non-Indian hunting or fishing within the Reservation.

2. Whether the authority of the State of New Mexico to impose its game and fish laws on non-Indians hunting or fishing on the Mescalero Apache Reservation has been preempted by federal legislation or treaty stipulation.

3. Whether the application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation infringes on the right of the Mescalero Apache Tribe "to make its own laws and be governed by them" contrary to *Williams* v. *Lee*, 358 U.S. 217 (1959).

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit on remand from the Supreme Court of the United States is reported at 677 F.2d 55 (10th Cir. 1982), and appears in the Appendix at 4a.[1] The original opinion of the United States Court of Appeals for the Tenth Circuit, which was previously vacated by this Court, is reported at 630 F.2d 724 (10th Cir. 1980), and appears in the Appendix at 9a. The judgment entered in this case by the United States District Court for the District of New Mexico on August 2, 1978, which appears in the Appendix at 35a, is unreported. The memorandum opinion of the District Court of August 2, 1978, which appears in the Appendix at 37a, is also unreported.

[1] "Appendix" refers to the appendix in the Petition for a Writ of Certiorari; "Respondent's Appendix" refers to the appendix in the Opposition to Petition for a Writ of Certiorari; "Jt. Appendix" refers to the Joint Appendix herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on remand from the Supreme Court of the United States, was filed on April 26, 1982 (Appendix at 2a). On June 25, 1982, Mr. Justice White extended the time within which to file a petition for writ of certiorari to and including August 25, 1982 (Appendix at 1a). The petition for writ of certiorari was filed on August 25, 1982, and was granted on November 15, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Material portions of pertinent treaty and statutory provisions are included in the Appendix at 54a, *et seq.*

STATEMENT OF THE CASE

A. The Factual Background

In July 1975, the Mescalero Apache Tribe opened the Inn of the Mountain Gods located on the Mescalero Apache Indian Reservation in south central New Mexico. The Inn of the Mountain Gods is a deluxe, tourist resort featuring a luxury hotel, a stocked lake for fishing, boating, and water sports, a golf course, pro shop, tennis facilities, swimming pool, trap and skeet shooting range, a stable complex, paddle tennis courts, restaurants, liquor lounges, and convention facilities (Respondent's Appendix at 6a-8a). The Inn is operated by the Mescalero Apache Tribe as part of a tourism program established by the Tribe to attract non-Indians to the Reservation as well as to the Sierra Blanca Ski Resort, a tribal commercial enterprise located adjacent to the Reservation. In connection with the operation of the Inn of the Mountain Gods, the Mescalero Apache Tribe also maintains a hunting and fishing business, including "package" hunts of big game animals, and a camping and picnicking program. "Package" hunts of big game animals include hunting fees, lodging at the Inn, guide service, and various other hunter needs (Respondent's Appendix at 9a-10a; Jt. Appendix at 142a-143a). The Inn of the Mountain Gods, as well as the Tribe's hunting and fishing business, caters almost

exclusively to non-Indian patrons from across the country. At least 97 percent of the guests at the Inn of the Mountain Gods, including hunters and anglers, are non-Indians from off the Reservation (Respondent's Appendix at 8a, 39a). Public highways and other state public facilities and services are used by persons hunting and fishing on the Mescalero Apache Reservation (Respondent's Appendix at 39a-40a).

In 1977 the Mescalero Apache Tribe adopted a general hunting and fishing ordinance which states it is applicable to all persons, Indian and non-Indian, who hunt or fish on the Reservation. The ordinance requires non-Indians to purchase a tribal permit, and it establishes seasons and bag limits. The ordinance also declares that "no state license of any kind shall be necessary for any person" with respect to hunting or fishing on the Mescalero Apache Reservation (Respondent's Appendix at 10a-11a). Prior to 1977 the Tribe's hunting brochures stated that all New Mexico hunting regulations apply on the Reservation (Respondent's Appendix at 16a).

Both federal and state agencies have assisted the Tribe's hunting and fishing business. In 1966 and 1967 the National Park Service donated 162 elk to the Tribe. These were shipped into New Mexico pursuant to a permit issued by the New Mexico Game and Fish Department which had encouraged the project (Respondent's Appendix at 14a). A Bureau of Indian Affairs range conservationist makes aerial surveys and pellet group transect studies to estimate deer, elk, antelope and bear populations, and he recommends seasons and bag limits for these species to the Tribal Council (Respondent's Appendix at 11a-12a). The U.S. Fish and Wildlife Service has provided technical assistance respecting management of fish, and has stocked reservation streams and several man-made lakes built with federal funds (Respondent's Appendix at 12a-14a).

The New Mexico Department of Game and Fish has in the past stocked streams on the Reservation and has supplied other assistance including the training of conservation officers at the request of the Tribe (Respondent's Appendix at 13a-14a, 16a). The elk, deer and bear populations in south central New Mexico range freely on and off the Mescalero Apache Reservation throughout the year (Respondent's Appendix at 15a).

Moreover, the State has maintained wildlife conservation programs of long standing in areas surrounding the Reservation (Respondent's Appendix at 19a-22a), and State officers enforced wildlife laws and regulations on the Reservation against nontribal members until 1969 when the Tribe informed the State that its fish and game officers would no longer be welcome on the Reservation without tribal permission (Respondent's Appendix at 29a). Thus, the assertion by the court of appeals that the State is unable to claim that it or its lands played any significant role in the creation and preservation of the reservation wildlife resource is contradicted by the record.

From at least 1971 through the period of this litigation, virtually all of the big game permits authorized by the Mescalero Apache Tribe have been sold (Respondent's Appendix at 35a-36a). The non-Indian demand for big game and package hunts has each year exceeded the number of permits available (Respondent's Appendix at 36a-37a). Revenues from the tribal hunting and fishing program as well as from the operation of the Inn of the Mountain Gods have increased annually over the last several years (Respondent's Appendix at 38a-39a).

B. Proceedings in the Courts Below

On July 7, 1977, the Mescalero Apache Tribe filed an action for declaratory and injunctive relief alleging, *inter alia*, that enforcement of the hunting and fishing laws of the State of New Mexico against hunters and anglers on the Mescalero Apache Reservation, either while they are on the Reservation or after they have departed from the Reservation, infringes on tribal sovereignty, conflicts with the Treaty of July 1, 1852, between the United States and the Apaches, 10 Stat. 979, and with certain other specific federal constitutional and statutory provisions. The complaint urged the District Court to declare that jurisdiction to regulate hunting and fishing on the Reservation is vested in the Tribe and the United States to the complete exclusion of the State of New Mexico.

The District Court determined that the Mescalero Apache Tribe has an inherent right to control hunting and fishing within tribal territory, a right which has been neither abrogated nor surrendered. The District Court found that this right to control rested exclusively with the United States and the Mescalero Apache Tribe because, although Congress could relinquish this authority to the several states, the court found no federal

legislation conferring upon the State of New Mexico authority to regulate on the Mescalero Apache Reservation. The District Court also concluded that the federally approved game and fish ordinances of the Mescalero Apache Tribe and its federally supported game and fish program on the Reservation constituted an "integrated scheme that results in the federal preemption of fish and game law on the Mescalero Apache Reservation." Appendix at 52a. The District Court enjoined the State of New Mexico from enforcing its hunting and fishing laws "against any person either on the reservation or after they [sic] have left the reservation for acts done on the reservation." Appendix at 35a-36a.

The United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, holding that the Mescalero Apache Tribe had "inherent authority" over wildlife within the Reservation that preempted the application of state game and fish laws to any person within its tribal territory; that the application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation had been preempted by federal legislation and treaty stipulation; and that application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation infringed on tribal self-government.

The State of New Mexico filed a petition for writ of certiorari in the Supreme Court of the United States on November 12, 1980, seeking review of the Tenth Circuit's decision. On April 6, 1981, this Court granted the petition, vacated the judgment of the Tenth Circuit, remanded the case to that court for further consideration in light of this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981), and awarded costs against the Mescalero Apache Tribe.

On remand, the Tenth Circuit accepted supplemental briefs from the parties and, on April 26, 1982, reinstated its previous decision. The opinion of the court of appeals on remand reiterated that state authority over non-Indian hunting and fishing on the Mescalero Apache Reservation would conflict with the Tribe's "broad power" to control "tribal resources" within the Reservation, and thus would infringe on the tribe's inherent sovereignty.

SUMMARY OF ARGUMENT

1. At the threshold of its decision in this case, the Tenth Circuit made the startling declaration that, in the area of wildlife management, the inherent sovereign authority of the Mescalero Apache Tribe is "so pervasive" that it extends beyond its accustomed and settled roles as a backdrop for interpreting statutes and treaties, *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 165 (1973), and as a foundation for tribal regulation of its members and their internal relations, *United States* v. *Wheeler*, 435 U.S. 313 (1978), and becomes an independent, substantive principle of law extending to nontribal members and having preemptive effect on state regulatory jurisdiction over non-Indians within an Indian reservation.

The Tenth Circuit's extraordinary departure from settled principles in this regard is based upon an historical tribal reliance on wildlife for subsistence and on the "significant interest" the court of appeals said this need gives to the Tribe to control its reservation wildlife resources. The threshold application of tribal sovereignty in this manner by the court of appeals is inconsistent with the limitations on the reach of tribal sovereignty expressed by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981), and inverts the analytical framework this Court has constructed for examining whether tribal authority extends to on-reservation activities by non-Indians and, if so, whether tribal authority is exclusive of state regulatory jurisdiction under the tests enunciated in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and *Williams* v. *Lee*, 358 U.S. 217 (1959). The decision of the Tenth Circuit leaves no room for an analysis of the relevant state and tribal interests in asserting jurisdiction over non-Indian hunting and fishing on the Mescalero Apache Reservation. Moreover, the threshold formulation of the court of appeals concerning inherent tribal sovereignty in the area of wildlife regulation distorted its "particularized inquiry" of the nature of the state, federal and tribal interests at stake.

2. States possess a special interest in fish and wildlife found within their borders, *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371, 386-387 (1978), and it has been the traditional assumption that state wildlife conservation laws

apply to tribal nonmembers on an Indian reservation. The state interest is such that, even on federally owned lands, Congress specifically recognizes the primary authority and responsibility of the states to protect and manage fish and resident wildlife, *e.g.*, § 302(b), Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b), and a state may regulate even Indian treaty rights if necessary to preserve a species of wildlife within the state. *Washington Game Dept.* v. *Puyallup Tribe,* 414 U.S. 44 (1973). Except where a species of fish or wildlife is threatened, therefore, a tribe has the right to hunt or fish on the reservation free of state regulation but, contrary to the court of appeals determination, the tribal right does not constitute inherent authority over wildlife which ousts concurrent state jurisdiction over nonmembers. Similarly, state jurisdiction is not preempted by the Treaty of July 1, 1852, for that treaty does not establish exclusive federal jurisdiction over the Mescalero Reservation. Nor is the New Mexico Enabling Act, which disclaims proprietary interest in Indian lands, a disclaimer of governmental control over nonmembers. The Indian Reorganization Act of 1934, 25 U.S.C. § 476, was also held preemptive, as were tribal ordinances concerning hunting and fishing enacted pursuant thereto. But these determinations by the Tenth Circuit squarely conflict with *Washington* v. *Confederated Tribes,* 447 U.S. 134 (1980) and *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978). The Tenth Circuit also discovered preemption in the federal assistance extended to the Tribe which included technical assistance, stocking of reservation lakes, and a transplant of elk from a national park in Wyoming. But pervasive federal regulation was not present, as in *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980), and the federal involvement was well below that described in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), which itself was held not to preempt a state taxing measure. Finally, the analysis of the Tenth Circuit in finding preemption in "negative inferences from Public Law 280," 18 U.S.C. § 1162(b), depends entirely on assuming that exclusive tribal authority exists over wildlife but that is the point to be proved.

3. The tribal right to hunt and fish is an insufficient basis for declaring that tribal authority over nonmember hunting and

fishing is exclusive. Fish and wildlife are not tribal resources like the minerals in *Merrion* v. *Jicarilla Apache Tribe*, ___ U.S. ___, 50 U.S.L.W. 4169 (U.S., Jan. 25, 1982), or like the timber in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and governmental claims to "ownership" of fish and wildlife are no longer recognized. *E.g.*, *Toomer* v. *Witsell*, 334 U.S. 385 (1948). The tribal right to hunt and fish is inseparably connected with tribal membership and is not transferable. The Tribe thus may not attempt to immunize nonmembers from New Mexico's wildlife conservation laws in order to maximize revenues from its hunting and fishing enterprise both because the Tribe is not entitled as a matter of law to achieve any particular level of revenue from its hunting and fishing enterpise, *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980), and because that is not the purpose of the traditional Indian right. The record demonstrates that the Tribe has encountered virtually no difficulty in selling its licenses. Moreover, the Tribe's complaint contained no allegation that the State had abdicated its trust responsibility over wildlife or that more stringent, discriminatory state regulations applied to nonmembers on the Reservation. *Montana* v. *United States*, 450 U.S. 544, 566 n. 16 (1981). Most importantly, state regulation of nonmember hunting and fishing bears no clear relationship to tribal self-government and does not threaten the political or economic security of the Tribe. *Montana* v. *United States*, 450 U.S. at 566.

ARGUMENT

I. The Mescalero Apache Tribe Does Not Have Inherent Authority Over Wildlife Within Its Reservation Which Preempts State Regulation of Non-Indian Hunting or Fishing Within The Reservation

The original opinion of the Tenth Circuit in this case concluded: (1) that state regulation of non-Indian hunting and fishing on the Mescalero Apache Reservation had been preempted by federal legislation and treaty stipulation, and (2) that state regulation of non-Indian hunting and fishing on the

Mescalero Apache Reservation would infringe on the right of tribal self-government.[2]

These conclusions by the court of appeals are a direct and virtually inexorable result from its startling threshold pronouncement that:

> The sovereign powers of the Tribe in wildlife management are so pervasive that sovereignty here moves from a mere backdrop into a leading role on the litigational stage.

Appendix at 16a. Implicit in this statement is the Tenth Circuit's acknowledgement that its decision in this case has elevated tribal sovereignty from its customary and settled role as a "backdrop" against which federal statutes and treaties are to be read in order to determine whether they preempt state authority on Indian land, *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), to an independent, substantive principle of law which, in the area of wildlife regulation, becomes the controlling consideration and itself may preempt state regulatory authority. Implicit also in the lower court's statement is the recognition that the court has extended the accepted scope of tribal sovereignty beyond tribal members and their internal affairs, *Montana* v. *United States*, 450 U.S. 544 (1981), to include, with respect to reservation hunting and fishing, exclusive regulation of nonmember hunters and anglers. Essentially, the court of appeals has given a novel and enlarged significance to inherent tribal sovereignty in the case of wildlife regulation. According to the decision below, tribal powers are supreme and exclusive of state jurisdiction in this area unless Congress has altered this circumstance by specific delegation of regulatory authority to the states. As the Tenth Circuit explained:

> [R]egulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the

[2] On remand, the Tenth Circuit entered a decision which re-instated its original decision and reiterated the conclusion that state authority over non-Indian hunting and fishing on the Mescalero Apache Reservation would conflict with the tribe's "broad power" to control "tribal resources" within the Reservation, and thus would infringe on the tribe's inherent sovereignty.

state, but when it does so it must be in specific terms. *United States* v. *New Mexico,* 590 F.2d 323, 328 (10th Cir. 1978), *cert. denied,* 444 U.S. 832 (1979).

Appendix at 20a. In a footnote to this statement, the Tenth Circuit further observed that: "Insofar as other courts have improperly presumed the existence of state jurisdiction in similar cases, their decisions do not control our determination," naming, in particular, the decision in *United States* v. *Montana,* 604 F.2d 1162 (9th Cir. 1979), *rev'd on other grounds, Montana* v. *United States,* 450 U.S. 544 (1981).

There is simply no support whatsoever in reason or authority to justify or sustain the unique and expanded significance given to the notion of inherent tribal sovereignty by the Tenth Circuit in this case. The lower court's extraordinary departure from settled principles in this regard rests at bottom upon an historical tribal reliance on hunting and fishing for subsistence, and on the "significant interest" the court below said this reliance gives the Tribe in regulating hunting and fishing on the Reservation.

According to the Tenth Circuit, tribal reliance on game and fish for subsistence somehow gave the Mescalero Apache Tribe inherent authority to "completely" control hunting and fishing in the vast territory which its members historically occupied[3] prior to the Treaty of July 1, 1852, between the Tribe and the United States. As the court of appeals explained it:

> The historical relationship between Indian tribes, their lands, and the wild game thereon has of necessity been one of great interdependence. Access to and control of wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States* v. *Winans,* 198 U.S. 371, 381 (1905). After a careful, thoughtful analysis, the district court properly determined

[3] According to the testimony of Myra Ellen Jenkins, New Mexico State Historian and Custodian of the Official Archives of the State of New Mexico, who testified as an expert witness with respect to the cultural, social and political history of the Mescalero Apache Tribe, the Mescalero Apache Tribe consisted of various nomadic bands which roamed vast areas of the Southwest including Texas, New Mexico, and the Republic of Mexico. Jt. Appendix at 168a.

> that, before the signing of the Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852), the Tribe "had inherent and complete authority to control the fish and game found within the confines of the tribal territory."
>
> * * *
>
> The Tribe's inherent authority stems largely from the traditional reliance on wild game for basic survival needs. See F. Cohen, *Handbook of Federal Indian Law* 286 (1942).

Appendix at 16a-17a. According to the court below, the Mescalero Apache Tribe remained possessed of this inherent right at the time of the execution of its treaty with the United States on July 1, 1852, and the Tribe maintained its right of inherent control over hunting and fishing in this vast region after the Treaty of July 1, 1852, because, in the judgment of the court of appeals, a treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," citing *United States* v. *Winans,* 198 U.S. at 381. Since the Mescalero Apache Tribe had not expressly relinquished in the 1852 treaty its previously acquired right of "complete" control over fish and game in this vast area, this tribal right continued after the execution of the treaty. Indeed, the tribal right to control wildlife thereby became, according to the court of appeals, a treaty-sanctioned, legal right which has not since been abrogated.

> [T]he Tribe retains its authority even though the treaty itself did not fix the boundaries of the tribal reservation. . . . Abrogation of any rights protected by treaty, particularly fundamental hunting and fishing privileges, must be explicit to be effective . . . and no congressional enactment here meets that standard.

Appendix at 17a. According to the Tenth Circuit, the Mescalero Apache Tribe continued to enjoy its previously acquired and unrelinquished inherent authority to exclusively control hunting and fishing in the vast region which its members occupied until the Mescalero Apache Reservation was created by Presidential Executive Order in 1873. Upon the creation of the Mescalero Apache Reservation, the tribal right to exclusive

control of hunting and fishing continued, but it was now, presumably, limited to the confines of the Reservation.

Finally, the court of appeals concluded that the inherent sovereignty which the Mescalero Apache Tribe had thus acquired and now retained as a treaty-recognized power, together with the territorial authority it possessed with respect to its Reservation, gave the tribe a "significant interest" in regulating reservation wildlife, on which it had historically relied for subsistence, that preempts state regulation of even nonmember hunting and fishing on the Reservation at the invitation of the Tribe. In this regard, the court below stated, "[W]e presume, when Indian tribes under federal protection seek to regulate *their traditional interests*, that federal law has preempted state jurisdiction." Appendix at 20a.

There is no dispute in this case that the Mescalero Apache Tribe relied on wildlife for subsistence and that tribal members freely took fish and game in ancestral territory. Nor is there any dispute that the tribal right to hunt and fish survived the Treaty of July 1, 1852, even though it was silent on the subject. *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968). Nor is there any quarrel that the tribal right to take fish and game within its reservation is exclusive if the tribe elects to exercise its unquestioned authority to exclude nonmembers from sharing in this activity. See *Merrion* v. *Jicarilla Apache Tribe*, ____ U.S. ____, 50 U.S.L.W. 4169 (1982). These are the only rights which the Mescalero Apache Tribe may claim by history or treaty.

The quarrel in this case is with the conclusion of the Tenth Circuit that the traditional tribal reliance on hunting and fishing for subsistence, together with the Tribe's governmental authority within its Reservation, confers upon the Tribe the right to exclusive regulation of reservation hunting and fishing by nonmembers invited by the Tribe to share in its otherwise exclusive privilege. The conclusion of the court of appeals is inconsistent with the scope of tribal sovereignty established by this Court in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *United States* v. *Wheeler*, 435 U.S. 313 (1978). It is for this reason, as well as those addressed later in this brief,

that the decision of the Tenth Circuit was previously vacated by this Court and remanded for further consideration in light of this Court's decision in *Montana* v. *United States, supra.* The remand was occasioned, at least in part, because the unique and enlarged significance given to the notion of inherent tribal sovereignty by the Tenth Circuit was irreconciliable with the limited application given to that notion in *Montana* and because the decision below offered no sound reason to warrant a departure, in the area of wildlife regulation, from the limited scope otherwise afforded tribal sovereignty.

On remand, however, the Tenth Circuit simply reinstated its previous decision and dismissed this Court's decision in *Montana* as irrelevant to the proceeding. The Tenth Circuit dispensed with *Montana* by making the superficial observation that *Montana* dealt with the power of an Indian tribe "to regulate fishing and hunting by non-Indians on lands within its reservation owned in fee simple by non-Indians," while the instant case involves the power of a state to regulate non-Indian hunting and fishing on reservation trust lands. Appendix at 6a.

In doing so, the Tenth Circuit failed to recognize and apply the underlying principles enunciated in *Montana* where this Court reiterated the principle that Indian tribes retain the inherent power over relations among members of a tribe but that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes" and cannot survive absent an express congressional delegation. 450 U.S. at 564. See *United States* v. *Wheeler,* 435 U.S. 313 (1978).

This Court applied that principle in *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), and rejected the assertion of inherent tribal sovereignty to exercise criminal jurisdiction over non-tribal members. Such application of tribal power would be inconsistent with the diminished scope of their sovereign authority. In the *Montana* decision, this Court extended the limitations on the reach of tribal sovereignty established in *Wheeler* and applied to criminal jurisdiction in *Oliphant* by explaining that:

> Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied

> support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.

450 U.S. at 565. This "general proposition" is applicable without exception to all lands within an Indian reservation, including both non-Indian fee lands and Indian trust lands. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 193, n. 1. Thus, contrary to the Tenth Circuit's superficial observation, the factual difference between the *Montana* case and this case is inconsequential.

The court below simply failed properly to apply in the instant action this "general proposition" of no inherent tribal power over nonmembers. Indeed, proper application of the "general proposition" in this case would have resulted in a threshold determination that the inherent sovereign powers of the Mescalero Apache Tribe do not extend to non-Indian hunting and fishing within the Mescalero Apache Reservation, regardless of whether reservation trust lands or non-Indian fee lands are involved. State regulatory authority over such nonmember hunting and fishing, on the other hand, should have been acknowledged, at least at the threshold of the Tenth Circuit's decision in this action. *See, e.g., United States* v. *McBratney*, 104 U.S. 621 (1882); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946).

In its decision in this case, however, the Tenth Circuit completely reversed this "general proposition" and concluded instead, based simply upon historic tribal reliance on hunting and fishing for subsistence and on the tribal right to hunt and fish freely on ancestral lands, that the inherent sovereign powers of the Mescalero Apache Tribe do indeed extend to the regulation of nonmember hunting and fish on the Mescalero Apache Reservation. This erroneous initial presumption fostered, in turn, the misperception that, with respect to nonmember activity on the reservation, tribal regulatory authority, to the complete exclusion of state regulation, is the rule, and state regulation the exception. According to the court below, the burden is on a state to establish that tribal regulatory authority over non-Indian hunting and fishing has been relinquished or

abrogated and that state regulatory authority has been ordained by federal delegation. In this regard, the court below relied on its decision in *United States* v. *New Mexico,* 590 F.2d 323 (10th Cir. 1978), *cert. denied,* 444 U.S. 832 (1979), and observed that regulatory powers within an Indian reservation belonged solely to the Congress and the resident Indian tribe, unless Congress has specifically delegated regulatory jurisdiction to the states. Appendix at 20a. Thus, the Tenth Circuit not only inverted the "general proposition" enunciated by this Court in *Montana* v. *United States,* it also concluded that the authority of the Mescalero Apache Tribe to regulate hunting and fishing within its Reservation was exclusive of concurrent state jurisdiction.

The original decision of the Tenth Circuit in this case thus completely misperceived the "source and scope" of both state and tribal power to regulate non-Indian hunting and fishing within tribal territory, which *Montana* had made clear.

To be sure, this Court in *Montana* recognized that there are some instances in which an Indian tribe retains inherent sovereign authority to regulate the activities of nonmembers on its reservation. In this regard, this Court said:

> . . . Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contract, leases, or other arrangements.

450 U.S. at 565. Nevertheless, even in those instances in which an Indian tribe is found to have inherent authority to regulate nonmember activity, this Court did not suggest that such authority is exclusive. On the contrary, this tribal authority is, in most instances, to be exercised concurrently with state regulatory jurisdiction. *United States* v. *Montana,* 604 F.2d 1162 (9th Cir. 1979).[4]

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[4] The decision of this Court in Montana v. United States left standing the ruling of the United States Court of Appeals for the Ninth Circuit that the State of Montana has concurrent jurisdiction with the Crow Tribe to regulate hunting and fishing by nonmembers of the Tribe on trust lands within the Crow reservation. The Ninth Circuit ruling was based essentially upon the "general proposition" approved by this Court on review, but the Tenth Circuit expressly disregarded the Ninth Circuit ruling as "improper." Appendix at 21a, n. 12.

Contrary to the lower court's formulation, a state's customary jurisdiction over non-Indians engaged in activities within an Indian reservation, whether on Indian trust lands or non-Indian fee lands, is not ousted unless a specific application of state law is preempted by federal law or would violate a tribe's right of self-government. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980); *Washington* v. *Confederated Tribes,* 447 U.S. 134 (1980); *White Mountain Apache Tribe* v. *Arizona,* 649 F.2d 1274 (9th Cir. 1981). Whether a specific application of state law is preempted by federal law requires:

> [A] particularized inquiry into the nature of the state, federal, and tribal interest at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

White Mountain Apache Tribe v. *Bracker,* 448 U.S. at 145. If no federal preemption is manifested by this process, the inquiry then turns to the question of actual infringement of tribal self-government. Thus, state law will be held inapplicable, even if not preempted by Congress, if it infringes upon the internal affairs of an Indian tribe. A finding of either federal preemption or infringement on Indian sovereignty is then a conclusion which results from applying this dual analysis, as this Court's decision in *Montana* v. *United States* clearly confirmed. The fundamental problem with the decision of the Tenth Circuit in this case is that the court left no room for a proper analysis of whether tribal authority extends to non-Indian hunting and fishing on the Mescalero Apache Reservation and, if so, whether it is exclusive of state regulatory authority under the tests enunciated by this Court in *Bracker* and *Williams* v. *Lee,* 358 U.S. 217 (1959). Instead, the Tenth Circuit relied upon its unprecedented determination that traditional tribal reliance on hunting and fishing for subsistence in ancestral lands was a sufficient basis to extend inherent tribal sovereignty to nonmember hunting and fishing within the Mescalero Apache Reservation to the complete exclusion of concurrent state authority. In doing so, the decision of the Tenth Circuit in this case is squarely in conflict with the decision of this Court in *Montana* v. *United States,* and it should be reversed.

To be sure, the Tenth Circuit did not alone rely on its novel formulation of exclusive inherent tribal sovereignty in the area of wildlife regulation to reach its decision in this case. In this regard, the court noted: "As important as sovereignty is in this case, we need not consider whether the tribe's sovereign powers alone are sufficient to preempt state jurisdiction." Appendix at 21a. The court found, in addition, federal preemption in the Treaty of July 1, 1852, and selected federal statutory provisions. As will be seen later in this argument, however, the court's analysis of these treaty and statutory provisions was so distorted by its threshold formulation as to the extraordinary role inherent tribal sovereignty plays in wildlife regulation, that it fell far short of the particularized inquiry as to the nature of the state, federal, and tribal interests at stake which this Court directed to be undertaken in *Bracker*. On the contrary, scant attention was given to the state's regulatory interest.

Moreover, the lower court's companion determination that application of state game and fish laws to nonmembers hunting and fishing on the Mescalero Apache Reservation infringed on self-government was likewise skewed by the extraordinary importance given by the court to inherent tribal sovereignty in the area of wildlife regulation. This is evident from the court's observation that:

> [T]he state, therefore, cannot interfere by attempting to control non-Indian hunting and fishing conducted exclusively on reservation land held by the tribe any more than it could do so if the activities in question took place in one of New Mexico's neighboring states.

Appendix at 6a. This statement reveals in dramatic fashion the perspective underlying the Tenth Circuit's decision in this case. Essentially, as the court below views it, the Mescalero Apache Reservation is, in fact, a sovereign authority on "equal footing" with the state of New Mexico and its sister states. This view is simply not the law as the ensuing arguments will establish.

II. The Court of Appeals Erred In Holding That Application of New Mexico's Wildlife Conservation Laws to Nonmembers on the Mescalero Reservation Has Been Preempted by Treaty and Federal Statutes

On remand from this Court "for further consideration in light of *Montana* v. *United States,*" 450 U. S. 1036 (1981), the court of appeals was of the view that the principles of *Merrion* v. *Jicarilla Apache Tribe,* ____ U.S. ____, 50 U.S.L.W. 4196 (1982), govern rather than those of *Montana.* The opinion of the court of appeals on remand deals with inherent tribal sovereignty, not with preemption, and finds support in *Merrion* for the "broad power of the Tribe to control, exploit, and regulate tribal resources on tribal lands." Appendix at 6a. Distinguishing *Montana* as inapplicable, the court of appeals stated, "The Court's decision in *Merrion* v. *Jicarilla* convinces us that *Montana* v. *United States* does not dictate a result different from that originally reached by this court in *Mescalero* v. *New Mexico.*" Appendix at 5a. With that, the Tenth Circuit affirmed the judgment of the district court and ordered that its previous decision be reinstated. Appendix at 7a.

The assertion of state regulatory authority[5] for activities on Indian reservations is permissible unless exercise of such authority has been preempted by federal law or unless it infringes on the right of reservation Indians to make their own laws and be ruled by them. *White Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136, 142 (1980). The Court in *Bracker* stated that both treaties and statutes must be examined "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." 448 U. S. at 144-145. Mechanical conceptions of state or tribal sovereignty do not control and the

[5] This case involves application of state regulatory authority not state taxing authority. The New Mexico laws here involved are laws and regulations requiring purchase of hunting and fishing licenses as well as substantive conservation regulations relating to seasons, bag limits, and means and methods of harvest of fish and game. Both the licensure requirements and the substantive regulations are referred to hereafter as "state wildlife conservation laws," which is intended to encompass regulations relating to both fish and wildlife.

endeavor should involve a particularized inquiry into the nature of the state, federal, and tribal interests at stake.

While treaties and statutes are thus to be read against a backdrop of Indian sovereignty in determining whether state power is preempted, the Tenth Circuit's analysis begins from the assumption of "broad power of the Tribe to control, exploit, and regulate tribal resources on tribal lands." Appendix at 6a. Under the court's analysis, sovereign powers of the Tribe in wildlife management are so pervasive that "sovereignty moves from a mere backdrop into a leading role on the litigational stage." Appendix at 6a.[6] Building on this assumption, the analysis of the court of appeals then "presumes" that federal law has preempted state jurisdiction "when Indian tribes under federal protection seek to regulate *their traditional interests.*" Appendix at 20a. Petitioner submits that the Tenth Circuit analysis is precisely the type of absolutist approach that *Bracker* sought to limit and provides no scope for consideration of the state interests involved. More than that, petitioner disputes the notion that tribes possess inherent powers of such breadth over reservation wildlife that regulation by a tribe preempts state jurisdiction. The court examined the treaty and several statutes and, in light of its notions of inherent tribal powers over reservation land and wildlife, the court had no difficulty in discovering at least six sources of preemption. We discuss these sources *seriatim* but we turn first to the traditional assumptions which relate to the precise issue here.

A. Applicability of State Wildlife Conservation Laws to Nontribal Members on a Reservation Has Been the Traditional Assumption

The court of appeals finds in the Tribe a broad power to exploit reservation wildlife which does not in fact exist. While this inherent power of the Tribe is variously referred to by the

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[6] Judge McKay's views on territorial integrity of the Mescalero Apache Reservation are set forth in detail in his dissent in the *en banc* decision of the Tenth Circuit in Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967, 986-987 (10th Cir.1980), cert. denied, 450 U.S. 959 (1981).

court below as "sovereign powers in wildlife management," "game control powers," "control of wildlife," and "broad power of the Tribe to control, exploit, and regulate tribal resources," Appendix at 16a, 17a, 17a, 6a, the fact is that what the Mescalero Tribe enjoys is not the right to control or manage wildlife but the right to hunt or fish on the Reservation free of state regulation. The court's handling of *United States* v. *Winans*, 198 U.S. 371 (1905), points up the distinction. *Winans* is cited by the Tenth Circuit for the proposition that access to *and control of* wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." Appendix at 16a. But, what *Winans* actually said is that "the right to resort to the fishing places" in controversy was not much less necessary than breathing. 198 U.S. at 381. The Yakima Indians in *Winans* had a right to fish at the usual and accustomed stations and grounds but not "control of wildlife."[7] The assumption by the court of appeals that the right to hunt and fish free of state law equates with sovereign power to manage wildlife is not supported by authority and involves a significant gap in sequence. In fact, it is erroneous.

By contrast, both on the larger issue of application of state criminal laws to nontribal members and the narrower question of application of state wildlife conservation laws on a reservation, the traditional assumption has been that state law applies. *United States* v. *McBratney*, 104 U.S. 621 (1882), established that a state has criminal jurisdiction over its own citizens and other nontribal members for acts committed on a reservation against non-Indians unless upon admission Congress had intended to except out the reservation or retain to the United States sole and exclusive jurisdiction over the reservation. Following *McBratney*, the Court in *Draper* v. *United States*, 164 U.S. 240 (1896), again upheld state criminal jurisdiction, said to result "from the very nature of the equality conferred on the

[7] Indeed, it is held that treaties with tribes of the Pacific Northwest which expressly reserve the fishing right, and which have spawned such a considerable amount of litigation, establish no absolute right to any particular level of fish supply. United States v. Washington, No 81-3111 (9th Cir., filed November 3, 1982), reversing in part, 506 F. Supp. 187 (W.D. Wash. 1980).

state by virtue of its admission into the Union." 164 U.S. at 243. See also *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946). Thus the *McBratney* line of cases, based on the equal footing doctrine, holds that jurisdiction over offenses committed by non-Indians against other non-Indians on an Indian reservation lies exclusively in the states and not in the federal courts.[8]

On the narrower question of applicability of state wildlife conservation laws, state authority to regulate nonmember hunting and fishing was, prior to the Cherokee Fishing Case in 1976,[9] uniformly recognized by courts, the Interior Department, and state Attorneys General. *White Earth Band of Chippewa Indians* v. *Alexander*, 683 F.2d 1129 (8th Cir. 1982); *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981); *United States* v. *Montana*, 604 F.2d 1162 (9th Cir. 1979), rev'd on other grounds, 450 U.S. 544 (1981); *United States* v. *Sanford*, 547 F.2d 1085 (9th Cir. 1976); *California* v. *Quechan Tribe*, 424 F.Supp. 969 (S.D. Calif. 1977), rev'd on other grounds, 595 F.2d 1153 (9th Cir. 1979); *Montana ex rel. Nepstad* v. *Danielson*, 149 Mont. 438, 427 P.2d 689 (1967); *Ex Parte Crosby*, 149 Pac. 989 (Nev. 1915); 78 I.D. 101 (1971);[10] 1960-1962 Opinions of the Attorney General of Oregon 11; 1953-1954 Report of the Attorney General of New Mexico 511; 1950-1952 Opinions of the Attorney General of Nevada 20.

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[8] The Handbook of Federal Indian Law (1958 ed.), published by the Department of the Interior, states at 513: "We have already noted the general rule that the Indian country within a State ordinarily is not regarded as an area of exclusive Federal jurisdiction but is politically and governmentally a part of the State in which State laws apply to the extent that they do not conflict with Federal Indian law."

[9] Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), petition for writ of certiorari voluntarily dismissed, 446 U.S. 960 (1980).

[10] The Solicitor of the Department of the Interior in 1971 issued a formal opinion advising that nontribal members are subject to state game laws on an Indian reservation. During 1976 the Solicitor's opinion was withdrawn without explanation.

There are two other traditions, also of long standing, which are relevant to the issue before the Court. The first of these is the special interest of the states in fish and wildlife, animals *ferae naturae*, found within their borders. While we now speak of the right to regulate, earlier cases referred to state "ownership" of wildlife, the ownership concept being described by Justice Frankfurter as "the symbol of one of the weightiest doctrines in our law," *Toomer* v. *Witsell*, 334 U.S. 385, 402 (1948) (concurring opinion), around which had clustered a voluminous body of rulings. States have broad trustee and police powers in respect of wildlife, *Kleppe* v. *New Mexico*, 426 U.S. 529, 545 (1976), and the ownership or title language in the 19th-century cases, while now recognized as a legal fiction, nevertheless was an expression of "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977), citing *Toomer* v. *Witsell*, 334 U.S. at 402.

As indicated by the Court in *Kleppe* v. *New Mexico*, *supra*, the authority of a state over fish and wildlife rests on a dual basis: trustee and police powers. The two bases import distinct notions. Police power *allows* the state to exercise authority to protect public health, safety and welfare while trusteeship implies obligation and responsibility, comparable to that of a fiduciary, and *requires* the state to exercise its public trust in a manner designed to promote the common benefit of present and future generations of its people. *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31, 41 (1908); *New Jersey Department of Environmental Protection* v. *Jersey Central Power & Light*, 125 N.J. Super. 97, 308 A.2d 671 (1973); *Maryland Department of Natural Resources* v. *Amerada Hess Corp.*, 350 F.Supp. 1060 (D. Md. 1972); *Hayes* v. *Bowman*, 91 So. 2d 795, 799 (Fla. 1957). See Sax, The Public Trust Doctrine, 68 Mich.L.Rev. 471, 477 (1969-1970). In sum, while state authority must be exercised within constitutional restraints, and while state control over wildlife does not preclude the proper exercise of federal power, states have a special interest in regulating and preserving wildlife for the benefit of their people. *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371, 386, 392 (1978) (concurring opinion of Burger, Ch. J.).

A second tradition, related to the first, is the pervasive policy of Congress in expressly declaring that state wildlife conservation laws are applicable on federal lands. Thus state laws affecting fish and wildlife are expressly declared by Congress to be applicable on over 400 million acres of public domain land administered by the Bureau of Land Management;[11] on over 250 million acres of national forest administered by the Forest Service;[12] on national recreation areas administered by the National Park Service and by the Forest Service;[13] on military reservations;[14] on lands administered by NASA and the Department of Energy (formerly AEC lands);[15] on national wildlife refuges administered by the Fish and Wildlife Service;[16] and on Wild and Scenic Rivers.[17] Congress has traditionally deferred to the special interest of the states in the protection and management of fish and resident wildlife and, on the few occasions when it has chosen to preempt primary state responsibility, Congress has done so self-consciously and precisely, as in section 6(f) of the Endangered

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[11] § 302(b), Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b).

[12] Ibid.

[13] E.g., 16 U.S.C. § 460n-4 (Lake Mead NRA); 16 U.S.C. § 460o-5 (Delaware Water Gap NRA); 16 U.S.C. § 460p-5 (Spruce Knob-Seneca Rocks NRA); 16 U.S.C. § 460q-4 (Whiskeytown-Shasta NRA); 16 U.S.C. § 460r-5 (Mt. Rogers NRA); 16 U.S.C. § 460v-3 (Flaming Gorge NRA); 16 U.S.C. § 460x-4 (Sleeping Bear Dunes National Lakeshore); 16 U.S.C. § 460z-7 (Oregon Dunes NRA); 16 U.S.C. § 460aa-7 (Sawtooth NRA); 16 U.S.C. § 460dd-4 (Glen Canyon NRA); 16 U.S.C. § 460gg-9 (Hells Canyon NRA).

[14] Engle Act, 72 Stat. 29 (1958), 10 U.S.C. § 2671.

[15] § 2, Sikes Act, 88 Stat. 1373, 16 U.S.C. § 670k.

[16] § 4(c), National Wildlife Refuge System Administration Act, 80 Stat. 927, 16 U.S.C. § 668dd(c).

[17] § 13(a), Wild and Scenic Rivers Act, 82 Stat. 917, 16 U.S.C. § 1284(a).

Species Act of 1973, 16 U.S.C. § 1535(f).[18] Even then, Congress has not completely ousted state authority which instead remains concurrent or residual as in the Endangered Species Act, 16 U.S.C. § 1535(f), and the Migratory Bird Treaty Act, 16 U.S.C. § 708. Annual migratory waterfowl hunting regulation thus involves the establishment of federal framework regulations within which a state may impose such stricter regulations as it chooses. Cf. *Carey* v. *South Dakota*, 250 U.S. 118 (1919). With this sketch of the traditional assumptions, we now address the court of appeals conclusion that state law is preempted by treaty and statute.

B. The Treaty Stipulations and Federal Statutory Provisions Are Not Preemptive of State Law

The court below determined that, as important as tribal sovereignty is in the case, it need not consider whether the Tribe's sovereign powers alone are sufficient to preempt state jurisdiction. Appendix at 21a. The court thereupon reviewed the Treaty of July 1, 1852 and several congressional enactments and concluded that each preempted application of New Mexico's wildlife conservation laws to nonmembers on the Reservation. We examine in turn each of these sources of preemption.

(1) *Treaty of July 1, 1852.* By emphasizing particular words in Articles 1 and 9 of the Treaty of July 1, 1852, the Tenth Circuit found the Treaty to be an "expression of federal dominance on the reservation" which completely preempted

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[18] The importance to Congress of state management of fish and wildlife is set forth in the report of the House Committee on Merchant Marine and Fisheries on the bill that was subsequently enacted as the Endangered Species Act of 1973:

> [T]he states are far better equipped to handle the problems of day-to-day management and enforcement of laws and regulations for the protection of endangered species than is the Federal government. It is true, and indeed desirable, that there are more fish and game enforcement agents in the state system than in the Federal government.

H.Rep. No. 93-412, 93d Cong., 1st Sess. 7 (1973). And see Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1247-50 (D.C. Cir. 1980).

the application of state law even to non-Indians on the Reservation. Appendix at 21a. The full text of these provisions, Appendix at 54a, does not, however, sustain the interpretation of the court below. Read in full, these treaty provisions mean only that the Tribe and its members recognized the sovereignty of the United States against which they had previously waged war, and that the United States would, in turn, provide a place for the Tribe to live. The meaning and significance accorded these treaty stipulations by the court below is not only at variance with the full text, it is also inconsistent with the decision *en banc* of the Tenth Circuit in *Mescalero Apache Tribe* v. *O'Cheskey*, 625 F. 2d 967 (10th Cir. 1980, *cert. denied*, 450 U.S. 959 (1981), *reh. denied*, 102 S.Ct. 1296 (1982). And see *United States* v. *Montana*, 604 F. 2d 1162 (9th Cir. 1979), rev'd on other grounds, 450 U.S. 544 (1981). In *Mescalero Apache Tribe* v. *O'Cheskey*, over the dissenting opinions of Judges Doyle and McKay, the Treaty of July 1, 1852, was construed by the court not to preempt application of New Mexico's gross receipts tax to non-Indians doing business with the Tribe on the Reservation. The court in *O'Cheskey* states:

> [The Treaty] was an agreement entered into with *some* Apaches, including some Mescaleros, and was ratified by Congress.... It was a treaty of "peace and friendship." As this was all it purported to be, it established no rights generally for either party nor any rights in land. See *Choate* v. *Trapp*, 224 U.S. 665.... The Mescaleros were then under the complete sovereignty of the United States.

624 F.2d at 971. The court below failed to explain why the so-called "federal dominance" expressed in the treaty preempts state game and fish laws in this case but not the gross receipts tax in *O'Cheskey*. In *United States* v. *Montana*, the Ninth Circuit dealt with the Treaty of 1851 with the Crow Tribe, which contains provisions similar to those involved here, and did not deem that treaty to preempt application of state laws to non-Indians hunting and fishing on the Crow Reservation. Petitioner submits that the lower court strains the language of the treaty beyond the limits of credible analysis.

(2) *The New Mexico Enabling Act.* The court below concluded that the Enabling Act for New Mexico, 36 Stat. 557 (1910), which places Indian lands in New Mexico "under the absolute jurisdiction and control of the Congress of the United States," taken in conjunction with the "exclusivity" language of the Treaty of July 1, 1852, preempts state law. The court stated: "In the area of resource management, the treaty language in this case suggests that 'absolute' jurisdiction is indeed 'exclusive' jurisdiction." Appendix at 22a.

As we have said above, there is simply no "exclusivity" language in the Treaty of July 1, 1852. Moreover, the decision of the court below is contrary to a line of cases starting with *Draper* v. *United States,* 164 U.S. 240 (1896), and extending through *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1961), to *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148 (1973) where this Court rejected "the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise" on or off tribal land. Nor can the court's ruling on the New Mexico Enabling Act be squared with Tenth Circuit decisions in *Mescalero Apache Tribe* v. *O'Cheskey, supra,* and *Jicarilla Apache Tribe* v. *United States,* 601 F.2d 1116 (10th Cir. 1979), simply by the device of saying that in the area of resource management "the treaty language suggests that 'absolute' jurisdiction is indeed 'exclusive' jurisdiction." Appendix at 22a. Unless this point is being assumed in consequence of the court's notions of inherent powers over wildlife, this is the very point to be proved.

In *Jicarilla Apache Tribe* v. *United States, supra,* the Tenth Circuit itself rejected the notion that the New Mexico Enabling Act established Indian reservations as exclusive federal jurisdictional enclaves, stating:

> By 1910, the date of the enactment of New Mexico's Enabling Act, both the Congress and the United States Supreme Court had established a procedure whereby Indian reservations might be created as exclusive federal enclaves within states and territories similar to military reservations created under the Arsenals and Dockyards Clause (U.S. Const. Art. I, § 8, Cl. 17). This procedure

> was followed exclusively only with respect to the Kansas Indians. A different procedure was followed with respect to the grant of New Mexico's statehood. In any event, today there is no exclusive federal jurisdictional Indian Reservation in the United States.

601 F.2d at 1129. See also *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981). In *White Mountain Apache*, the Ninth Circuit concluded:

> Arizona's disclaimer does not preclude it from imposing a license fee on non-Indians hunting and fishing on a reservation, even though such a fee is related to reservation realty. A state license fee is not a property tax or a tax paid by "nonmembers of the Tribes," *id.*, and has only an indirect effect on the tribal treasury.

649 F.2d at 1280. The court below apparently interpreted the Enabling Act in light of the court's assumption that the Tribe possesses inherent authority over wildlife but that assumption is unwarranted and so also is its reading of the New Mexico Enabling Act.[19]

(3) *Indian Reorganization Act of 1934.* The Tenth Circuit also inferred preemption of state authority over non-Indian hunting and fishing from the language of the Indian Reorganization Act of 1934 which "reconfirms" in Indian tribes organizing under the Act "all powers vested in any Indian tribe . . . by existing law." The court below reasoned that tribal power over reservation hunting and fishing was "unquestionably vested" prior to 1934, and thus its "reconfirmation" in the Indian Reorganization Act gave that Act itself preemptive effect. The court further observed that tribal ordinances regarding hunting and fishing on the reservation enacted pursuant to the Indian Reorganization Act may themselves serve to preempt state law on the reservation.

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[19] Questions relating to the meaning and application of Montana's and Arizona's Enabling Acts, in the context of state court adjudication of Indian water rights, are now pending before this Court in Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 3217 (October 8, 1982), and San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 3217 (October 8, 1982).

But there is no intent whatsoever in the Indian Reorganization Act to delegate to tribes authority to preempt state regulations otherwise applicable to nonmembers. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), it was urged that the Reorganization Act confirmed tribal criminal jurisdiction over nonmembers but this Court stated that the Act merely gives each Indian tribe the right to organize for its common welfare and adopt an appropriate constitution and by-laws. And, in the *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980), the *Colville Cigarette* case, the Court flatly refused to infer from the fact that tribes exercise congressionally sanctioned powers of self-government that Congress "has thereby delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe." 447 U.S. at 156. And see *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d at 1281. The court below cites footnote ten of *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980) for its own proposition that the Reorganization Act "reconfirms all preexisting powers of the Tribe and itself becomes a source of preempting power," Appendix at 23a, but the *Bracker* reliance is simply misplaced as a reading of the *dicta* of the cited footnote demonstrates.

(4) *Federal Developmental Assistance.* The court below also found preemption of state law in the federal assistance provided to the Mescalero Apache Tribe by the Department of the Interior in the development of a tribal hunting and fishing enterprise. This conclusion on the part of the court likewise conflicts with decisions of this Court and with at least one other decision of the Tenth Circuit itself.

The federal assistance which the court below considered to be preemptive of state law was a donation of elk, fish stocking of reservation lakes, technical assistance on fish management, and aerial surveys and animal pellet studies by a Bureau of Indian Affairs range conservationist to assess wildlife populations. This finding, that occasional federal assistance to the Tribe preempts the application of state law to non-Indian hunters and anglers on the Reservation is wholly inconsistent with the preemption standard expressed by this Court in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). In

Bracker, this Court declared that congressional enactments and comprehensive implementing regulations establishing a pervasive federal regulatory scheme (as opposed to material and technical assistance) must be involved in order to oust state law from application on an Indian reservation. Indeed, as explained in *Bracker:*

> Our decision today is based on the preemptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Company* v. *Arizona Tax Commission*, *supra*, leaves no room for the additional burdens sought to be imposed by state laws.

448 U.S. at 151, n. 15. In *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), federal involvement in an Indian commercial enterprise was found not to preempt the application of state law to the tribal activity. In that case, the Bureau of Indian Affairs had conducted a feasibility study, and had provided equipment and construction money by a loan from the federal government. The necessary land was supplied by the Forest Service on a long-term lease to the tribe. The degree of federal activity in the instant case falls far below that involved in the *Jones* case.[20] And see *Mescalero Apache Tribe* v. *O'Cheskey*, 625 F.2d at 974 (concurring opinion).

(5) *Public Law 280.* Finally, the court of appeals determined that federal preemption resulted from "the negative inferences from Public Law 280." Appendix at 21a. The court reasoned that because Public Law 280, 18 U.S.C. § 1162(b), protects previously conferred or "traditional" Indian hunting and fishing rights from being hindered in those states which have accepted Public Law 280 jurisdiction, a non-Public Law

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[20] A major aspect of federal assistance to the Mescalero Tribe is a fish hatchery on the Reservation heretofore operated by the U.S. Fish and Wildlife Service which provided fish for stocking the waters of the Mescalero Reservation and other Indian reservations and pueblos in New Mexico and surrounding states. Respondent's Appendix at 12a-13a. During 1982 Congress withdrew funding for operation of the Mescalero hatchery by the Fish and Wildlife Service. The House Committee on Appropriations noted that it had "no objection" to funding of the hatchery by the Bureau of Indian Affairs but the Committee appropriated no additional funds therefor. H.Rep. No. 97-942, 23, 56 (1982).

280 state like New Mexico may not, *a fortiori*, hinder such rights. But, again, this conclusion is based on the Tenth Circuit's assumption that the Treaty of July 1, 1852, afforded the Mescalero Tribe "sovereign power to manage wildlife" for the reason that it did not expressly withdraw such power. In fact, the Treaty of July 1, 1952, afforded no such sovereign power to the Tribe. Public Law 280 would not prohibit New Mexico even if it were a Public Law 280 state from exercising the authority it seeks to exercise in this case. The court's analysis of the preemptive effect of the treaty and statutes is colored by its initial assumption but that assumption is wrong and so also is the Tenth Circuit's analysis of the sources of preemption.

III. State Regulation of Nonmember Hunting and Fishing on the Mescalero Reservation Does Not Infringe on the Right of the Tribe to Make its Own Laws and Be Governed by Them

A. The Tenth Circuit's Finding of Infringement Is Based on a Failure to Properly Evaluate and Balance the State and Tribal Interests at Stake

On remand, the court of appeals determined that principles enunciated in *Merrion* v. *Jicarilla Apache Tribe*, ____ U.S. ____, 50 U.S.L.W. 4196 (1982) rather than those of *Montana* govern. Appendix at 7a. Pointing to language in *Merrion* that tribal authority to tax "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services," Appendix at 5a, along with the authority to exclude non-Indians from tribal lands, the court of appeals determined that respondent Tribe had built up the wildlife on its Reservation and seeks now to manage it for economic return. Appendix at 6a. Under these circumstances, the court held, concurrent state jurisdiction in respect of nonmember hunting and fishing is ousted for it would interfere with the Tribe's efforts to manage, preserve and improve wildlife resources on the Reservation.

New Mexico cannot interfere by attempting to control nonmember hunting and fishing conducted exclusively on reservation land "any more than it could do so if the activities in question took place in one of New Mexico's neighboring states." Appendix at 6a.

The court of appeals thereupon affirmed the judgment of the district court and ordered reinstated its previous decision. In that decision, the court of appeals had held that application of New Mexico's wildlife conservation laws to nonmembers would infringe on the right of the Tribe to govern itself per the rule in *Williams* v. *Lee*, 358 U.S. 217 (1959). Specifically, the court of appeals found that state regulation would (1) financially impair the tribe's hunting and fishing enterprise; (2) interfere with the tribal regulatory program over its "reservation's resources"; and (3) deny the tribe an opportunity to develop its own system of wildlife management. Appendix at 26a-28a.

A basic premise of the Tenth Circuit's ruling is the court's observation that dual regulatory schemes create dislocations. Because of this characteristic of dual regulation, the court stated, "[W]e presume, when Indian tribes under federal protection seek to regulate *their traditional interests*, that federal law has preempted state jurisdiction." Appendix at 20a. The Tenth Circuit doctrine of presumed preemption, operative when a tribe involves itself in a "traditional interest," finds no support in the cases. Quite to the contrary, in *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980), this Court stated that, while a tribe could itself preempt state taxation through the exercise of properly delegated federal power to do so,

> [W]e do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.

447 U.S. at 156. The Tenth Circuit's willingness to presume what the Supreme Court refuses to infer lies at the core of the infringement aspect of the instant case. The Ninth Circuit in

White Mountain Apache Tribe v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981), like this a case involving application of state wildlife conservation laws to nonmembers for on-reservation acts, also refused to infer a "far-reaching authority" in tribes to preempt state fees and regulations applicable to nonmembers. 649 F.2d at 1281.

The contradictory results being reached in the federal courts on this question seem to us to manifest the larger uncertainty surrounding the reach of state taxing and regulatory powers on a reservation when nonmember activities are involved. As recent decisions of this Court have moved toward "particularized inquiry" into the nature of state, federal, and tribal interests at stake, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145 (1980), more recently described as "flexible consideration" of these interests, *Ramah Navajo School Board* v. *Bureau of Revenue*, ____U.S.____, 50 U.S.L.W. at 5104, with individual decisions rendered on seemingly *sui generis* principles, the lower federal courts have become increasingly engaged in policy choices, essentially legislative in character. Cf. *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365-66 (1949). States now stand at risk of being divested of jurisdiction by ad hoc federal court determinations based on isolated valuations of the validity, worth or need for the particular state regulatory or taxing measure without regard to any general fundamental principles. Indeed, the Solicitor General last Term invited this Court to establish as a rule of law that, at least in the area of state taxation of nontribal business, on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation. 50 U.S.L.W. at 5104. This invitation, which would place on the state the burden to demonstrate that its taxing activity is either condoned by Congress or justified by a compelling need to protect legitimate state interests, was specifically declined by the Court which chose instead to remain with its flexible approach.

The Tenth Circuit in the instant case employed a standard which goes beyond even the Solicitor General's suggestion in *Ramah Navajo*. Application of this standard would endow

Indian reservations with virtually the same territorial sovereignty as is enjoyed by the states with respect to civil jurisdiction. The Tenth Circuit's formulation leaves no room for the application of state regulation to nonmembers unless specifically authorized by Congress.

If one properly applies the flexible, particularized approach of *Bracker* to the federal, state, and tribal interests at stake in this case, we think it apparent that the ruling of the court below is erroneous. But, further, it seems to us, application of *Bracker* by lower federal courts in the cases involving application of state wildlife laws to nonmembers has had the effect of trivializing important aspects of state sovereignty, permitting divestiture of state jurisdiction by federal courts on the basis of idiosyncratic reaction to evidence, evidence which may later prove to be ephemeral although it results in rulings that are final. For example, the Ninth Circuit has indicated that, in applying the *Bracker* test, it will examine whether the wildlife in question range on and off a reservation. As we discuss herein, the applicability to nonmembers of state wildlife conservation laws should be made to depend on more fundamental bases.

On the infringement with tribal government aspect of the case, therefore, it is petitioner's position that a proper analysis of the particularized interests of federal, tribal and state governments demonstrates that New Mexico's wildlife conservation laws are applicable to nontribal members without infringing tribal self-government. But we urge this Court to go further and clarify application of *Bracker* in wildlife cases such as this so as to remove, as much as is reasonably possible, the considerable uncertainty that now seems to prevail.

B. State Regulation of Nonmember Hunting and Fishing on the Mescalero Reservation Does Not Threaten the Economic Security or Disrupt the Regulatory Activity of the Tribe

While the *ratio decidendi* of the lower court's infringement holding is difficult to isolate, the ultimate factor appears to be the "bottom line." "The unquestioned importance to the Tribe of the game revenues contributed to the district court's determi-

nation that tribal self-government was infringed upon, and we affirm that finding." Appendix at 27a. The importance of revenues to the Tribe is linked with the assertion by the court of appeals that inherent sovereignty permits the Tribe "to determine how its reservation's resources shall best be regulated." Appendix at 6a.

The problem with the "impairment of revenues" argument is twofold: it is wholly unsupported by the record which, in fact, points in the very opposite direction, and it is insufficient in law. The record clearly establishes that the Tribe has encountered very little, if any, difficulty in selling licenses. A stipulation made between the parties during 1977 and introduced in evidence in this proceeding includes the following facts:

> (1) From at least 1971 through 1974 all of the big game licenses including deer, elk and bear, authorized by the Mescalero Apache Tribe were sold. During this period a large number of fishing permits was likewise sold by the Mescalero Apache Tribe.[21]
>
> (2) All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1975-1976 hunting season including deer, elk and bear, were sold. During this period 19,454 fishing permits were likewise sold by the Mescalero Apache Tribe.[22]
>
> (3) For the years 1972 through 1976, the Mescalero Apache Tribe issued the following number of fishing permits: 1972, 9,521; 1973, 10,985; 1974, 9,135; 1975, 19,454; 1976, 29,163. State of New Mexico fishing licenses have been required each year for non-Indian fishermen either by the Tribe or by court order.[23]
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> (4) All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1976-1977 hunting season, including deer, elk and bear, were likewise sold by the Mescalero Apache Tribe.[24]

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[21] Respondent's Appendix at 35a.
[22] Id., at 35a-36a.
[23] Id., at 18a.
[24] Id., at 36a.

(5) All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1977-1978 hunting season, including deer, elk, bear and antelope, were sold except four of the ten antelope licenses which were authorized for the first time in 1977. During this period an undetermined number of fishing permits was likewise sold by the Mescalero Apache Tribe.[25]

(6) Many applications for big game licenses and package hunts have had to be turned down each year that they have been made available by the Mescalero Apache Tribe because the number of such applications has exceeded the number of licenses and package hunts that have been made available by the Tribe.[26]

(7) The revenues the Mescalero Apache Tribe receives from the sale of hunting and fishing, and picnicking and camping permits and package hunts at the Inn of the Mountain Gods has increased from $7,787 in 1961 to $269,140 in 1976. Prior to and during this period the State of New Mexico has enforced its hunting and fishing laws and regulations against non-Indians hunting or fishing within the Mescalero Apache Reservation, after they have departed the Reservation.[27]

In light of these stipulated facts it is extraordinarily difficult to understand the assertion by the court of appeals that application of state law interferes with the Tribe's effort to manage, preserve and improve wildlife resources and "would render much of the tribal regulatory scheme a nullity." Appendix at 11a, 6a.[28] The plain fact is that the Mescalero hunting

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[25] Id., at 36a.

[26] Id., at 36a-37a.

[27] Id., at 38a-39a.

[28] During the hearing on the Tribe's application for preliminary injunction, the Tribe's president knew of no instances where hunters had been discouraged by state law from hunting on the reservation:

> Q. Well, let me ask you, Mr. Chino, do you know of any instance in which any hunter who has expressed an interest to hunt on the Mescalero Reservation has been dissuaded or deterred from doing so because of fear that he will be prosecuted by the State of New Mexico if he violates any of the laws or regulations of the State pertaining to hunting or fishing?
>
> A. Not to my personal knowledge.

Jt. Appendix at 130a.

and fishing enterprise is part of a tourism program designed to attract income for the Tribe, and the Tribe has encountered little, if any, difficulty in selling licenses, if that be a dispositive factor on which state jurisdiction hinges.[29] *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976), makes clear that Indians do not have an absolute entitlement to achieve some particular sales volume by passing their tax-exempt status to non-Indian customers. See *Washington* v. *Confederated Tribes*, 447 U.S. at 173 (concurring opinion of Brennan, J.). Moreover, the complaint contains no allegation that the State has abdicated or abused its trust responsibility for protecting and managing wildlife, that it has established its season, bag or creel limits in such a way as to impair treaty or other Indian rights to fish or hunt on the Mescalero Reservation, or that more stringent regulations apply to nonmembers when on the Reservation than in other parts of the State. See *Montana* v. *United States*, 450 U.S. at 566, n. 16.

Indeed, the complaint and the decisions of both lower courts appear to be founded on the very "mechanical or absolute conceptions" of tribal sovereignty which *Bracker* has taken out of vogue.[30] Not only is there no significant impairment of license sales there is neither allegation nor evidence of any significant conflict in the tribal and state regulatory structures which might, conceivably, serve as the basis for a finding of impairment of some tribal right. *Montana* v. *United States*,

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[29] Richard A. Wardlaw, administrative assistant to the president of the Tribe, testified that in 1976 the Tribe charged $1,400 for a bull elk package hunt. "Of that, $400 went to the Inn and a thousand dollars went to the Tribe on the bulls." Jt. Appendix at 143a. In 1977 the Tribe charged $2,000 for a bull elk package hunt. Plaintiff's Exh. 39; Jt. Appendix at 90a.

[30] The court of appeals dealt with the lack of evidence of impairment in its discussion of standing and, finding no actual impairment, developed a theory of imputed financial impairment. "Even though all tribal licenses are now sold, and applications for licenses exceed the number available, that fact merely reflects the Tribe's conservative adjustment to market forces in devising its own fee structure." Appendix at 14a. In other words, the court of appeals assumed that the Tribe could maximize the price of its licenses if it were not necessary for the sportsman to possess a state license. But this imputation fails as well. If a tribe is not entitled to achieve a particular sales volume, Moe v. Salish & Kootenai Tribes, supra, it is similarly not entitled to achieve any particular price level.

450 U.S. at 566, n. 16.[31] As in the Tenth Circuit's financial impairment analysis, the analysis of regulatory impairment by the court is based not on actual impairment or nullification but on the theoretical assertion that dual regulatory schemes create mutual dislocations. Appendix at 20a. Except for its *ipse dixit*, there is no basis for the Tenth Circuit's determination that application of state law threatens to financially impair the Tribe's hunting and fishing business.

A second aspect of the Tenth Circuit's infringement determination is that application of New Mexico's wildlife conservation laws to nonmembers would "interfere with the Tribe's efforts to manage, preserve, and improve wildlife resources on its reservation." Appendix at 6a. The apparent basis for this determination is that the Tribe, with the aid of the federal government, has built up and managed the wildlife on its Reservation, that this has been accomplished without state aid, and that the Tribe now seeks to enjoy these benefits. Citing *Washington* v. *Confederated Tribes* for the proposition that Indian tribes have an interest in raising revenues for essential government programs, an interest which is strongest when the revenues are derived from value generated on the reservation and the taxpayer is the recipient of tribal services, 447 U.S. at 156-157, the court of appeals concluded that there is no evidence that the state supplies any management service on the reservation where the hunting occurs. Under such circumstances, the court of appeals concluded, it is up to the Tribe "to determine how its reservation resources shall best be regulated," Appendix at 6a, and concurrent jurisdiction would "interfere with the Tribe's efforts to manage, preserve, and improve wildlife resources on [the] reservation." Appendix at 6a. There are a multitude of problems with this line of reasoning.

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[31] Indeed, although at least one regulatory conflict remained, it was stipulated, Respondent's Appendix at 25a-26a, that the New Mexico State Game Commission had in the past amended its regulations to accommodate tribal preferences. The one conflict, concerning the state prohibition on holding an elk license two years in a row, is a conflict of modest proportions, particularly because it is platonic in nature, there being no evidence that any person had sought in fact to hunt elk on the Reservation two consecutive years.

(1.) *Fish and Wildlife Are Not Tribal Resources.* Fish and wildlife not kept in enclosures or tamed or domesticated but which instead are in a state of nature are regarded as *ferae naturae.* In *McKee* v. *Gratz*, 260 U.S. 127 (1922), the Court through Justice Holmes referred to game birds or freely moving fish that "may shift to another jurisdiction without regard to the will of the landowner or state," and that are in possession of no one. 260 U.S. at 135. This is the very essence of animals *ferae naturae* and, as we have said above, governmental claims of ownership to animals *ferae naturae* are no longer recognized. Statutes declaring title to game and fish to be in the state, according to Justice Holmes, "[S]poke only in aid of the state's power of regulation." 260 U.S. at 135. The fish and wildlife found on the Mescalero Reservation, therefore, unlike the minerals in *Merrion* or the timber in *Bracker*, are not tribal property.

A question nearly identical to the instant question was addressed by the Solicitor of the Department of the Interior in 1971 and, while this formal opinion was withdrawn in 1976 without comment, its reasoning survives. 78 I.D. 101 (1971). The Ute Tribe had obtained one hundred elk from a Yellowstone Park herd, paying for their transportation and release on the reservation. Utah permitted the taking of elk by residents but not by nonresidents. The Commissioner of Indian Affairs sought advice on whether the tribe may allow nonresidents to hunt, indicating that the tribe would be deprived of a substantial source of income if nonresident hunting were not permitted. Advising that nonmembers are subject to state game laws while on an Indian reservation, the Solicitor reasoned that since states do not "own" wild game neither could an Indian tribe unless it were thought that tribal sovereignty is a sovereignty superior to that of the states or the federal government, a notion rejected as implausible. If the tribe had captured and confined the elk, the Solicitor observed, an argument in favor of tribal ownership would be stronger. Absent that, "there can be no individual

property in fish and game so long as they remain wild, unconfined, and in a state of nature." 78 I.D. at 102.[32]

Nothing in the treaties with the Mescalero or the Executive Order of March 24, 1883, establishing the present boundaries of the Reservation makes mention of rights or privileges of hunting and fishing. Nevertheless, it is held that hunting and fishing rights are implicitly held by the tribe. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). The traditional tribal right, however, is inseparably connected with tribal membership and is not transferable.[33] The analysis of the Tenth Circuit decision begins by finding in the Tribe inherent authority over wildlife which, it is said, "stems largely from the traditional reliance on wild game for basic survival needs." Appendix at

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[32] The converse question is treated in an earlier solicitor's opinion. In Hunting, Fishing and Trapping Rights of the Nez Perce Indians, 60 I.D. 368 (1949), the Commissioner of Indian Affairs asked whether Idaho could apply its conservation laws to Indians of the Nez Perce Reservation if the state stocked the reservation with fish and game. The Solicitor (Mastin G. White) thought it plain that the question must be answered in the negative:

> In the modern world, property and sovereignty have been regarded as distinct concepts. The power to regulate the taking of fish and game is an aspect of sovereignty; and the sovereignty of a State does not (in the absence of consent by Congress) extend to the members of an Indian tribe on an Indian reservation. Moreover, the State cannot assert ownership of fish and game with which it may stock a particular area, for the rule has long been recognized that there is no property in fish and game once held captive but since returned to a state of nature. They are regarded as *ferae naturae*.

60 I.D. at 370-71.

[33] The opinion of the Interior Solicitor (J. Ruell Armstrong) in Klamath Terminal Legislation, 62 I.D. 186 (1955), answers a number of questions relating to members of the Klamath Tribe who elect under the Act of August 13, 1954 to withdraw from the tribe and have their interest in tribal property converted into money. In answer to a question whether hunting and fishing rights have an appraisable value which should be included in the sum to be paid to a withdrawing member, the opinion of the Solicitor states: "No decision of which we are aware has held that the right to hunt and fish on the tribal lands is a property right which is vested in the individual member of the tribe. It is a right which the member may exercise in common with other members of the tribe. The right is inseparably connected with membership and when membership ceases, the right comes to an end. The right is not subject to transfer and is incapable of transmission by descent or devise. Accordingly, it has no appraisable value which can properly be included in the sum to be paid to withdrawing members." 62 I.D. at 194.

17a. But, from this point on the logic of the argument collapses for there is no nexus shown to exist between hunting and fishing, which were recognized in the treaties as normal incidents of Indian life, *Menominee Tribe* v. *United States*, 391 U.S. at 405, n. 2, and the Mescalero's commercial enterprise whose success depends upon maximizing harvest of fish and wildlife, not by Indians who possess rights inseparably connected with tribal membership, but by non-Indians who do not. Indeed, there is absolutely no relationship between traditional Indian hunting and fishing and the package hunts for big game held when the days grow short, not out of conformity to tribal tradition, but in order to stimulate business at the Inn of the Mountain Gods by sandwiching in hunters and fishermen between the summer tourist season and the winter ski season.[34]

If the purpose of the Tribe's implied immunity from state wildlife conservation laws is food for basic survival, as the court states, and the maintenance of traditional ways, which we would add, immunity attaches to activity reasonably falling within the scope of the purpose. But, manifestly, it is not the purpose of the right to provide tribal revenues. The Mescalero hunting and fishing enterprise is simply not within the purpose; it is a secondary use of wildlife to which the tribal immunity does not attach. Cf. *United States* v. *New Mexico*, 438 U.S. 696, 702 (1978); *United States* v. *Top Sky*, 547 F.2d 486 (9th Cir. 1976).

(2.) *State Regulation Does Not Interfere With Tribal Management.* The court of appeals concluded that application to nonmembers of New Mexico's wildlife conservation laws would interfere with tribal efforts to "manage, preserve, and improve" reservation wildlife resources. There is no support in the record for this remarkable conclusion nor is it based on any finding of the trial court. The only conceivable grounds for

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[34] Paragraph 7 of the stipulation provided in part: "Package hunts of big game animals are held to help stimulate business at the Inn of the Mountain Gods. Package hunts normally occur between the summer tourism season and the winter ski season. The purpose of the tourism program is to provide income for [governmental purposes and economic development]." Respondent's Appendix at 9a.

such a conclusion are that under state law elk hunters may not hunt during two consecutive years and that, as a matter of economics, the Tribe may not be able to charge higher prices for its licenses. While the first item is part of the record herein, there was no evidence for the second, viz., that the Tribe's fees had reached levels which would discourage hunters and fishermen. Indeed, the evidence was to the contrary, and the Tenth Circuit's inelasticity of demand analysis was purely theoretical.

Neither was there any allegation in the complaint or evidence that state conservation laws had impaired the ability of the tribe to "preserve" or "improve" wildlife on the reservation. The words "preserve" and "improve" are not terms of art in wildlife conservation but carry their common meanings. The record flatly contradicts the conclusion that tribal efforts to improve and preserve have in any way been impaired by the state.[35]

The word "management" is, in fact, a term of art in wildlife conservation and has been defined by Congress in the Marine Mammal Protection Act as follows:

> [T]he collection and application of biological information for the purposes of increasing and maintaining the number of [marine mammals] at the optimum carrying capacity of their habitat. Such terms include the entire scope of activities that constitute a modern scientific resource program including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within [the term "management"], when and where appropriate, is the periodic or total protection of species as well as regulated taking.

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[35] New Mexico retains the right to take steps necessary to preserve species of fish and wildlife on the Mescalero Reservation. Even treaty rights may be controlled by a state by the need to conserve a species and thus the state retains the right to control hunting and fishing by tribal members where necessary to preserve a species found within the state or to prevent its progressive depletion. Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44, 49-50 (1973).

§ 3(2), 86 Stat. 1028, 16 U.S.C. § 1362(2).[36] It is obvious that state law does not interfere with the ability of the Tribe to conduct research, censusing, law enforcement, habitat acquisition and improvement, or total protection of fish and wildlife. The special interest of the state in wildlife is at its strongest in the area of taking, and it is in this area that the fit between the state and the tribal system is not a perfect congruence. But unless there is some showing that the lack of congruence impairs Indian rights or infringes tribal government, there is no basis in law for ousting state jurisdiction.

Moreover, the implied communal right of a tribe, from which individual members benefit, is the right to immunity from state wildlife conservation laws not the right to manage wildlife. Certainly, as a landowner, a tribe may engage in many activities which constitute wildlife management. A tribe, for example, may forbid hunting and fishing by nonmembers, undertake habitat improvements, or engage in research and censusing of wildlife. More than that, as an entity which is sovereign for some purposes, it may enact regulations establishing when and how individual members may exercise communal hunting and fishing rights. This determination is a power which a tribe retains under its inherent power to regulate internal affairs, *Williams* v. *Lee*, 358 U.S. at 221-222, and is held to extend even to tribal members exercising treaty fishing rights off-reservation. *Settler* v. *Lameer*, 507 F.2d 231 (9th Cir. 1974). But the tribal immunity may not be parlayed into exclusive tribal jurisdiction simply by characterizing the immunity as the right to manage wildlife. The two concepts are not synonymous.

We think it is plain that no basis exists for the Tenth Circuit's conclusion that application of New Mexico's wildlife conservation laws to tribal nonmembers would infringe on the

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[36] While we acknowledge that few marine mammals reside within the exterior boundaries of New Mexico, the definition of "management" in the Marine Mammal Protection Act of 1972 transcends marine mammals and is equally applicable to terrestrial forms of wildlife other than endangered species. In the case of endangered species, a slightly different definition applies because, by the very nature of the beast, regulated taking of endangered species represents the extraordinary situation. See § 3(2), Endangered Species Act of 1973, 87 Stat. 885, 16 U.S.C. § 1532(2).

right of the Mescalero Apache Tribe to govern itself. By definition, an inability to transfer tribal immunity to nonmembers does not derogate the Tribe's ability to govern members nor, again by definition, does it nullify or impair tribal enjoyment of the implied communal right. The inability impedes no clearly expressed federal interest, as in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), nor has the federal government undertaken comprehensive regulation as in *Bracker*. State regulation of nonmember hunting and fishing does not bear closely enough on the federal interest in self-determination for Indian people to infringe tribal self-government. Cf. *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

Indeed, the court's expansive reading of tribal self-government is at variance with *Montana* v. *United States* where this Court was unable to find in the regulation of hunting and fishing by nonmembers on fee patented lands a "clear relationship" to tribal self-government or internal relations. 450 U.S. at 564. As this Court viewed the issue, nothing in the *Montana* case suggested that such nonmember hunting and fishing would "so threaten the Tribe's political or economic security as to justify tribal regulation." 450 U.S. at 566. The Court in *Montana* reaffirmed the notion that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Having distinguished *Montana* as inapplicable, however, the court of appeals was not moved by this Court's reaffirmation that tribal self-government is not territorial sovereignty.

C. Whether State Wildlife Conservation Laws Infringe on Tribal Self-Government Should Rest On Considerations of a Fundamental Nature

In the exercise of its trustee responsibilities the ultimate state interest is the security and relative equilibrium of fish and wildlife species found within its borders. Indeed, even treaty

rights are controlled by the need to conserve a species. *Washington Game Dept.* v. *Puyallup Tribe*, 414 U.S. 44 (1973). In examining the state and tribal interests at stake here, as called for by *Bracker*, the court of appeals weighed the need for tribal revenue with the state interest in wildlife and found that the scales tipped in favor of the Tribe. The court felt that the value involved here had been generated on the reservation by the Tribe and that state services received on-reservation were minimal. Appendix at 26a. But whereas the Tenth Circuit found the matter of game revenues to be of "unquestioned importance," the Ninth Circuit deemed a decrease in tribal revenues "not overly weighty." *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d at 1283. The *White Mountain Apache* court, on the other hand, was interested in whether the wildlife in question range on and off the reservation. 649 F.2d at 1283.

We have no quarrel with the *Bracker* analysis which calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake. In line with modern congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency, the particularized inquiry analysis called for in *Bracker* was designed to move away from resolution of disputes by application of broad *per se* conceptions. Nevertheless, it is one thing to utilize particularized inquiry to resolve situations where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164, 179 (1973), and another thing entirely to trivialize the special state interest in wildlife by hinging it upon the existence *vel non* of conditions which do not take the measure of that interest. In the instant case, for example, the court of appeals ousted state jurisdiction because of a theoretical impact of dual regulation on tribal revenues even though such revenues were in fact increasing. While the impact on tribal treasuries is the type of factor which Congress might consider, it does not in our view

constitute infringement of tribal government unless its impact is so severe as to impair the tribe's ability to function.[37]

Whether wildlife range on and off the reservation is similarly an unsuitable basis on which to hinge state jurisdiction. In the instant case it was stipulated that part of the elk, deer and bear populations range on and off while the antelope population seldom leaves the reservation. Respondent's Appendix at 15a. If the range of wildlife were a significant factor in the allocation of jurisdiction, then some of the species on a reservation might end up under concurrent jurisdiction and other species not, with the results depending largely on the configuration of the particular reservation and migration patterns at a particular time. Dual regulation would be likely for smaller reservations and exclusive tribal jurisdiction in the larger reservations. On larger reservations, however, dual regulation would result if wildlife populations happened to reside on the periphery.

The interest of the state has traditionally pertained to fish and wildlife which are *ferae naturae*. The relevant issue in our view is not whether wildlife range on and off a reservation but whether, for example, they are penned up or domesticated. Unless a more fundamental decisional calculus such as this is established, the basis for a finding of jurisdiction will likely change over time as wildlife, paraphrasing Justice Holmes, shift to another jurisdiction without the will of the tribe or the state. New Mexico contains nineteen Indian pueblos and seven

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[37] The Supreme Court has rejected arguments under the Natural Gas Act of 1938 that the impact on state treasuries of natural gas rates in interstate commerce must be considered. In re Permian Basin Area Rate Cases, 390 U.S. 747, 822, n. 114 (1968); Federal Power Comm'n v. Hope Gas Co., 320 U.S. 591 (1944). Similarly, with respect to federally established rates for intrastate gas, it is held that unless the impact is so severe as to impair the state's ability to function effectively in a federal system, federal regulation which has an indirect effect on state treasuries is not the same impermissible intrusion on state sovereignty found in National League of Cities v. Usery, 426 U.S. 833 (1976). See Public Service Co. v. Federal Energy Regulatory Comm'n, 587 F.2d 716 (5th Cir. 1979), cert. denied, 444 U.S. 879; Oklahoma v. Federal Energy Regulatory Comm'n, 494 F.Supp. 636, 657 (W.D. Okla. 1980), aff'd 661 F.2d 832 (10th Cir. 1981).

Indian reservations, Respondent's Appendix at 3a; the State of Washington, for example, has twenty-two reservations. Owing to the trustee responsibilities of a state, case-by-case adjudication may well be required unless more fundamental state wildlife interests are recognized by this Court.

The court of appeals also identified an intention to preempt state jurisdiction as "an element in the Tribe's favor." Appendix at 11a, n. 3. But, absent specific congressional authority, a tribal attempt to preempt state power by simply enacting an ordinance inconsistent with the power and authority of the state is void, *Fisher* v. *District Court*, 424 U.S. 382 (1976), and should not weigh in the balance at all.

Finally, two other interests which have been identified underscore the need for more fundamental determinants of jurisdiction. The court of appeals observed that value on the reservation had been generated by the Tribe with the aid of the federal government and that state services were minimal. Appendix at 26a. Presumably the court of appeals had in mind a national fish hatchery, operated on the Reservation by the U.S. Fish and Wildlife Service, which provided fish for stocking Reservation waters, and the importation of elk donated by the National Park Service. Respondent's Appendix at 12a, 14a. But, again, considerations such as these may also prove ephemeral. During 1982, for example, Congress withdrew funding for the operation by the Fish and Wildlife Service of a number of national fish hatcheries, including the Mescalero hatchery, the House Committee noting that it had "no objection" to Bureau of Indian Affairs funding of the hatchery but appropriating no additional funds therefor. H.Rep. No. 97-942, 23, 56 (1982).

A balancing of interests by reference to past contributions to fish and wildlife is legitimate so long as the focus is sufficiently broad. Thus, for example, in a state such as New Mexico which produces and maintains big game populations, the contributions thereto by the people of the state are not measured solely by reference to stocking of a particular stream or transplantation at a particular location but instead to the

entire spectrum of activity which makes it possible for a state to support big game populations in huntable numbers. Some of these contributions were alluded to by this Court in *Baldwin* v. *Montana*, 436 U.S. 371, 389 (1978), including taxes for support of access roads, for support of fire suppression to protect wildlife habitat throughout the state, and for support of statewide air and water quality standards. As the Court noted in *Baldwin*, forage support by ranchers is critical to winter survival of big game in many situations. The New Mexico Department of Game and Fish undertakes extensive, ongoing research and experimental programs into problems of fish and wildlife management encountered within the state. See, e.g., Defendants' Exhibit No. AG. A major state concern is also to arrest the spread of infectious diseases in wildlife. New Mexico maintains control programs through the Department of Game and Fish and the Department of Health and Environment against the outbreak or introduction of contagious wildlife diseases which could result in destruction of both cattle and wildlife, a legislative concern of the State of New Mexico.[38] A failure to consider such larger contributions focuses the analysis too narrowly for, as the district court stated in *Mescalero Apache Tribe* v. *O'Cheskey*, 439 F.Supp. 1063, 1073 (D. N.M. 1977), the Mescalero Reservation is situated in New Mexico, "not located by itse. on another planet."

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[38] For example, the Legislature in 1927 enacted the following provision:

> In order to protect game animals, birds and fish against importation of undesirable species and introduction of infectious or contagious diseases, it is a misdemeanor to import any live animals, birds or fish into this state, except domesticated animals or fish from government hatcheries, without first obtaining a permit from the department of game and fish.

§ 17-3-32, NMSA. See also § 17-2-32, NMSA (relating to bubonic plague in animals).

CONCLUSION

For all the reasons set forth above, the decision of the court of appeals should be reversed.

Respectfully submitted,

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